APPENDIX

[Filed Dec. 22, 1997]

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-30002

KIMBERLY ANN GREENWELL,
Plaintiff-Appellee,

versus

RAYTHEON AEROSPACE, INC., *et al.*,
Defendants,

RAYTHEON AEROSPACE, INC. and WAYNE LEESE,
Defendants-Appellants.

Appeal from the United States District Court
for the Eastern District of Louisiana
(95-CV-2138)

Before DAVIS, JONES and DENNIS, Circuit Judges

PER CURIAM *

Appellants Raytheon Aerospace, Inc. ("Raytheon") and Wayne Leese ("Leese") appeal a jury verdict in favor

* Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

of Kimberly Ann Greenwell on her claims of sex-based discrimination under Title VII and Louisiana anti-discrimination laws.

Having considered the oral and written arguments of counsel and the record in this case, we see no reversible error in the rulings or judgment of the district court, except as to the award of punitive damages. With respect to the latter issue, however, we conclude that the plaintiff failed to present sufficient evidence from which a reasonable trier of fact could conclude that Raytheon engaged in discriminatory practices "with malice or with reckless indifference to the federally protected rights of [the plaintiff appellee]." 42 U.S.C. § 1981a(b)(1); *see Patterson v. P.H.P. Healthcare Corp.*, 90 F.3d 927, 943-44 (5th Cir. 1996); *Farpella-Crosby v. Horizon Health Care*, 97 F.3d 803, 809-10 (5th Cir. 1996).

Accordingly, the judgment of the district court is REVERSED in part, to vacate the award of punitive damages, and AFFIRMED in all other respects.

Minute Entry [Entered Dec. 9, 1996]
Duval, J.
December 5, 1996

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 95-2138

Section "K"

KIMBERLY ANN GREENWELL

versus

RAYTHEON AEROSPACE, INC., *et al.*

Before the court are defendants' Renewed Motion for Judgment as a Matter of Law, or in the Alternative, for a New Trial, pursuant to Federal Rules of Civil Procedure 50(b) and 59, and Motion for Relief from Judgment, pursuant to Federal Rule of Civil Procedure 60.[1] Both motions were set for hearing on October 16, 1996, and were taken on the papers. Having reviewed the record and the memoranda, the court finds that only the demand for remittitur contained in defendants' motion has any merit; all other bases for post-trial relief shall be denied.

A brief review of the case is in order. Plaintiff Kimberly Ann Greenwell filed suit against defendants Raytheon Aerospace Company ("Raytheon"), Dave Robinson and Wayne Leese for alleged sexual harassment, sex discrimination, retaliation, under Title VII and state law.

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[1] Also submitted on October 16, 1996 was defendants' Motion for Stay of Execution or Enforcement of Judgment. Pursuant to its October 18, 1996 Minute Entry, the court denied a motion to stay execution or enforcement of the judgment and ordered defendants to post a bond in the amount of $407,520.00.

Raytheon employed Greenwell since 1990. In 1994, while working as lead person for Raytheon on a maintenance contract between Raytheon and the Louisiana Army National Guard, Greenwell claimed that she was subjected to sex-based discrimination and harassment from certain National Guard personnel at her job. Greenwell filed a formal complaint in 1994. Three months later, Raytheon demoted and transferred plaintiff to the Naval Air Station at Belle Chasse purportedly due to her unsatisfactory job performance. Plaintiff filed suit in federal court on July 6, 1995. This case proceeded to trial on August 27, 1996. On August 30, 1996, the jury rendered its verdict in favor of plaintiff Greenwell and against the only remaining defendants, Raytheon and Wayne Leese, in the amount of $600,000.00 finding both sex-based harassment and retaliation. The court entered a judgment in the amount of $607,250.000 which reflected awards of back-pay, compensatory and punitive damages.

Now defendants move the court to grant them post-trial relief from the judgment. In rendering its verdict the jury completed a detailed set of interrogatories indicating the basis for relief as to each defendant, as follows:

> 1) Raytheon discriminated against or harassed plaintiff on the basis of her sex in violation of federal law;
>
> 2) Raytheon discriminated against or harassed plaintiff on the basis of her sex in violation of state law;
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> 3) Raytheon unlawfully retaliated against plaintiff in violation of federal law;
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> 4) Plaintiff unlawfully retaliated against plaintiff in violation of state law;
>
> 5) Wayne Leese unlawfully retaliated against plaintiff in violation of state law;
>
> 6) Plaintiff was entitled to $100,000.00 in compensatory damages;

7) Raytheon acted willfully or with reckless disregard to plaintiff's rights in discriminating against her or retaliating against her;

8) Plaintiff was entitled to an award of $500,000.00 in punitive damages against Raytheon.

Defendants seek post trail relief on based on the following reasons:

1) Plaintiff failed to prove there was a hostile environment in order to sustain her sexual harassment claim;

2) Plaintiff failed to prove severe or pervasive sexual harassment existed at the Lakefront facility in order to prove that there was a hostile environment;

3) Plaintiff failed to prove that Raytheon's investigation of her formal complaint was inadequate, and thus show that they failed to take remedial action;

4) Plaintiff failed to prove retaliation against Raytheon in part because she failed to prove the reasons for her demotion and transfer were pretextual;

5) Plaintiff failed to prove retaliation against Leese because she failed to prove that he undertook an adverse employment action against her;

6) Plaintiff failed to prove her claim for punitive damages because an employer is not required to pay punitive damages in a "mixed motive" sex discrimination case;

7) Plaintiff failed to prove her claim for punitive damages because she failed to prove that Raytheon acted with malice or reckless indifference with respect to her federal rights;

8) The jury award should be reduced based on the statutory caps imposed on awards of punitive dam-

> ages awarded in Title VII cases under 42 U.S.C. § 1981a(b)(3);
>
> 9) The court erred in admitting evidence of David Robinson's communications with plaintiff despite's defendant's motion in limine to exclude same under Federal Rule of Evidence 408 which precludes evidence of settlement negotiations;

Of the reasons set forth, the first seven appear to be grounds for judgment as a matter of law and the last two appear to be grounds for new trial. Rule 50 and Rule 59 set out different standards for review of the evidence. In this instance, the evidence is such that the court will not disturb the jury's verdict under either standard based on the evidence. The damages award, however, must be reduced.

Rule 50(b)—Judgment as a Matter of Law

Under Rule 50 of the Federal Rules of Civil Procedure, the court must determine whether there is sufficient evidence to support the jury's verdict and in so doing all evidentiary conflicts are to be resolved in favor of the successful party and that party is to be given the benefit of all reasonable inferences.

As stated in the seminal case *Boeing Co. v. Shipman*, 411 F.2d 365, 374-75 (5th Cir. 1969), in considering a motion for judgment as a matter of law, the court:

> should consider all of the evidence—not just that evidence which supports the non-mover's case—but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the court believes that reasonable men could arrive at a contrary verdict, granting the motion is proper. On the other hand, if there is substantial evidence opposed to the motions, that is evidence that such quality and weight

> that reasonable and fair-minded men in exercise of impartial judgment might reach different conclusions, the motion should be denied . . .

See Branch v. Chevron Int'l Oil Co., 681 F.2d 426, 428-29 (5th Cir. 1982).

Having presided over this trial, the court firmly believes that taking all the evidence in the light and with all reasonable inferences most favorable to plaintiff Greenwell, there is sufficient evidence of such quality and weight that reasonable and fair-minded jurors in the exercise of impartial judgment might reach different conclusions, and thus, the motions must be denied. In addition to there being sufficient evidence to support the jury's findings, the detailed interrogatories they completed certify that due consideration was given by them with respect to the claims of sexual harassment and retaliation against both Raytheon and Leese. The court hereby incorporates and reiterates its reasons for denying defendant's judgment as a matter of law pursuant to Rule 50(a) with respect to those claims.

The award of punitive damages against Raytheon sounded in sufficient evidence to overcome a Rule 50(b) motion. While the punitive damages award must be reduced under law, the court finds that the award of punitive damages is supported by the evidence. The Civil Rights Act of 1991, 42 U.S.C. § 1981a, provides that punitive damages may be awarded against an employer proven to have, "engaged in discriminatory practice or discriminatory practices with malice or reckless disregard to the federally protected rights of an aggrieved individual." 42 U.S.C. § 1981a(b)(1). Defendant Raytheon does not content that this is a mixed motive case. This is correct. Rather, Raytheon asserts that the jury instructions "expressly instruct the jury on a mixed motive analysis," without referring the court to the instruction it has in mind. In a mixed motive case the jury would have

been instructed that a defendant may not be held liable when, even if it had not taken gender into account, it would have made the same employment decision regarding the aggrieved employee. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 242 (1989). No such instruction was given to the jury in this case. Defendant also contends that plaintiff failed to carry her burden of proving that defendant's motives were in fact pretextual. The court has already stated that the evidence sufficiently supported the jury's findings with respect to both retaliation and sex harassment.

Defendant next claims that plaintiff failed to prove that Raytheon acted with malice or reckless disregard to plaintiff's federal rights. As stated above, the jury had evidence upon which it could reject defendant's legitimate, non-discriminatory reason for transferring and demoting plaintiff. That same evidence could be grounds for finding that Raytheon acted with malice or reckless indifference with respect to plaintiff's federal rights in its decision to transfer and demote her, despite its proffered reasons. Based on the evidence adduced at trial, reasonable minds could differ as to whether Raytheon acted with malice or reckless indifference with respect to plaintiff's federal rights. Thus, the court denies Raytheon's Rule 50(b) motion with respect to punitive damages.

Rule 59—Motion for a New Trial

The standard provided under Rule 59 of the Federal Rules of Civil Procedure to determine whether a new trial or remittitur is required is different from that of Rule 50. The rule does not specify what grounds are necessary to support such a decision; however, case law demonstrates that a new trial may be granted of the district court finds that verdict is against the weight of the evidence, the damages awarded are excessive, the trial was unfair, or prejudicial error was committed in its

course. *Smith v. Transworld Drilling*, 773 F.2d 610, 613 (5th Cir. 1985). In making its determination, the lodestar is whether the verdict is against the great weight of the evidence or would result in a miscarriage of justice. Unlike a Rule 50 motion, there is no need to view the evidence in the light most favorable to the nonmoving party. Wright & Miller § 2806.

As discussed above, plaintiff's sex harassment, retaliation, and punitive damages claims were well supported by the evidence. Thus, the jury's verdict and its answers to the jury interrogatories were not against the great weight of the evidence and clearly withstand this Rule 59 motion.

The damages awarded plaintiff were excessive based on applicable law. The court agrees that remittitur is appropriate. The court entered a judgment against defendant in the amount of $607,250.00. Of that amount, $7,250.00 was awarded in backpay, $100,000.00 was awarded in compensatory damages, $500,000.00 was awarded in punitive damages against Raytheon. Punitive damages were awarded under Title VII alone, since no punitive damages were available to plaintiff under state law; compensatory damages were awarded for both state and federal law violations by Raytheon and Wayne Leese. Further, Leese could only have been liable for compensatory damages under state law, for which there is no cap on the amount of recovery. Section 1981a(b)(3) caps awards of compensatory and punitive damages in Title VII suits at $300,000.00 Since the $100,000.00 compensatory damages award could have been based on state law violations alone, that portion of the award is not subject to the damages cap imposed by section 1981a. Only the punitive damages award of $500,000.00 against Raytheon for Title VII violations is subject to the statutory cap imposed by section 1981a. Applying the cap, the punitive damages award against Raytheon should be reduced from $500,000.00 to $300,000.00. Finding no

reason to disturb the other awards of damages and back-pay, this leaves plaintiff with an award totalling $407,-250.00.

Finally, the court rejects defendant's argument that plaintiff's testimony regarding her communications with Dave Robinson should have been excluded on the basis of Federal Rule of Evidence 408, which precludes the admission of compromise negotiations to prove liability. The claim against Dave Robinson was dismissed on the basis of a Rule 50(a) motion at trial. Rule 408 does not operate to exclude this testimony. In rejecting defendants' argument this time, the court hereby reiterates its reason for refusing to exclude to testimony as set forth in its August 25, 1996 Minute Entry.

Rule 60(b)—Motion for Relief from Judgment

Defendants next seek relief from judgment based on res judicata. The bases for granting relief from final judgment under Rule 60(b) are not applicable in this instance.[2] Defendant contends that it is entitled to relief from judgment based on the res judicata effect of a state court judgment which dismissed with prejudice plaintiff's

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[2] Rule 60 provides the following bases for relief from final judgment: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence, (3) fraud; (4) the judgment is void; (5) the judgment has been satisfied, released or discharged; (6) "any other reason justifying relief from the operation of the judgment." The only possible basis for relief based on a failure to raise a res judicata defense would be under Rule 60(b)(6), since the other enumerated bases are clearly inapplicable. Relief under Rule 60(b)(6), however, should be granted only if extraordinary circumstances are present. *Picco v. Global, Marine Drilling Company*, 900 F.2d 846, 850 (5th Cir. 1990). Failure to raise res judicata defense or learn of a related prior proceeding are in this instance accredited to neglect of counsel which neglect is neither excusable nor otherwise extraordinary as to justify relief from judgment under the rule. *General Plumbing & Heating, Inc. v. American Filter Company, Inc.*, 696 F.2d 375, 379 (5th Cir. 1983).

sex discrimination case against the Louisiana Army National Guard ("LAANG").

Res judicata is an affirmative defense which must be affirmatively pled by defendant under Rule 8(c) of the Federal Rules of Civil Procedure. *Russell v. Sun America Securities, Inc.*, 962 F.2d 1169, 1172 (5th Cir. 1992). Thus, defendant had the burden to plead res judicata and plaintiff had no concurrent obligation to inform the court or defendant of the state court judgment. A federal court applies state law in determining the res judicata effect of a state court judgment. *Hernandez v. City of Lafayette*, 699 F.2d 734, 736 (5th Cir. 1983). Under Louisiana law, identity of parties is a required element of the doctrine of res judicata. *See* La. Stat. Rev. 12:4231; *Morris v. Haas*, 93-75 (La. App. 5th Cir. 5/30/95), 659 So.2d 804. Raytheon and LAANG are not identical parties. The state dismissal with prejudice of claims against LAANG or its personnel does not impact a the judgment against Raytheon, Greenwell's employer, under Title VII for Raytheon's discriminatory practices, even if there is some overlap between the persons involved. In sum, defendant's cry of res judicata is too late, not a sound basis for Rule 60(b) relief from this judgment, and lacks merit under Louisiana law.

Based on the foregoing, the court grants a remittitur and no other post-trial relief. Accordingly,

IT IS ORDERED that Defendants' Motion for Judgment as a Matter of Law, or Alternatively, for New Trial is GRANTED IN PART with respect to the request for remittitur and the judgment against defendant's is hereby REDUCED to $407,250.000; and DENIED with respect to all other asserted grounds.

IT IS FURTHER ORDERED that Defendants' Motion for Relief from Judgment is DENIED.

/s/ Stanwood R. Duval, Jr.

[Filed Dec. 6, 1996]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 95-2138

Section "K"

KIMBERLY ANN GREENWELL

versus

RAYTHEON AEROSPACE, INC., *et al.*

JUDGMENT

This action came on for trial with a jury before the Honorable Stanwood R. Duval, Jr. presiding, and the issues having been duly tried and a decision having been duly rendered,

IT IS ORDERED, ADJUDGED AND DECREED, that there be judgment herein in favor of plaintiff, Kimberly Ann Greenwell and against defendants, Raytheon Aerospace Company and Wayne Leese, in the amount of one hundred thousand dollars and no cents ($100,000.00), with legal interest from date of judicial demand calculated at the rate provided by federal law and defendants shall bear the costs;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that there be judgment herein in favor of Kimberly Ann Greenwell and against defendants, Raytheon Aerospace Company and Wayne Leese, in the amount of $7,520.00 with legal interest from date of judicial demand calculated at the rate provided by federal law.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that there be judgment herein in favor of Kimberly Ann Greenwell and against defendant, Raytheon Aerospace Company, in the amount of five hundred thousand dollars and no cents ($500,000.00), with legal interest from date of entry of judgment until paid;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of defendant, Dave Robinson, and against plaintiff, Kimberly Ann Greenwell, dismissing all claims against him;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of Kimberly Ann Greenwell and against defendants, Raytheon Aerospace Company and Wayne Leese, for all reasonable attorneys' fees. The amount of attorneys' fees is hereby referred to Magistrate Judge Lemelle for a Report and Recommendation and a hearing, if necessary, upon proper motion.

New Orleans, Louisiana this 5th day of September, 1996.

/s/ Stanwood R. Duval, Jr.
STANWOD R. DUVAL, JR.
United States District Judge

[Filed Dec. 9, 1996]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 95-2138

Section "K"

KIMBERLY ANN GREENWELL

versus

RAYTHEON AEROSPACE, INC., *et al.*

AMENDED JUDGMENT

The court having granted a remittitur in this matter pursuant to its December 5, 1996 Minute Entry and reduced the award against defendant Raytheon, the judgment is amended, as underlined below, to reflect same.

This action came on for jury trial before the Honorable Stanwood R. Duval, Jr. presiding, and the issues having been duly tried and a decision having been duly rendered.

IT IS ORDERED, ADJUDGED AND DECREED, that there be judgment herein in favor of plaintiff, Kimberly Ann Greenwell and against defendants, Raytheon Aerospace Company and Wayne Leese, in the amount of one hundred thousand dollars and no cents ($100,000.00), with legal interest from date of judicial demand calculated at the rate provided by federal law and defendants shall bear the costs;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that there be judgment herein in favor of Kimberly Ann Greenwell and against defendants, Ray-

theon Aerospace Company and Wayne Leese, in the amount of $7,520.00 with legal interest from date of judicial demand calculated at the rate provided by federal law.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that there be judgment herein in favor of Kimberly Ann Greenwell and against defendant, Raytheon Aerospace Company, in the amount of *three hundred thousand dollars and no cents ($300,000.00)*, with legal interest from date of entry of judgment until paid;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of defendant, Dave Robinson, and against plaintiff, Kimberly Ann Greenwell, dismissing all claims against him;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of Kimberly Ann Greenwell and against defendants, Raytheon Aerospace Company and Wayne Leese, for all reasonable attorneys' fees. The amount of attorneys' fees is hereby referred to Magistrate Judge Lemelle for a Report and Recommendation and a hearing, if necessary, upon proper motion.

New Orleans, Louisiana this 9th day of December, 1996.

/s/ Stanwood R. Duval, Jr.
STANWOOD R. DUVAL, JR.
United States District Judge

BEECH AEROSPACE SERVICES, INC.
INTER-OFFICE COMMUNICATION

From: Wayne Leese Date: 5 May 1994

To: Kimberly Greenwell

Subject: Sexual harassment investigation

Results

You stated that the loud tone of voice used towards you by Mr. Babin should not be considered sexual harassment. The offensive statement by another National Guardsman which occurred about eighteen months ago was sexual harassment.

Action taken

The complaint of harassment was passed on to LTC Nuss and CWY Babin during separate meetings on 4 and 5 May 1994. LTC Nuss stated that sexual harassment is not condoned at this National Guard site. He requested that an individual that has been harassed in any way should report the nature of the harassment to him as soon as possible.

Mr. Babin stated that any statement, action, or tone of voice that is considered offensive in any way should be reported to him also. That the person responsible for the sexual harassment statement was counseled and warned not to make statements of this nature.

Note: Any action or statement that you consider to be sexual harassment or offensive in any way should be reported to your supervisor or base management personnel in accordance with base policy and procedure 070-91 as soon as possible.

/s/ Wayne Leese

/s/ Kimberly A. Greenwell

[DoD Logo]

DEPARTMENTS OF THE ARMY
AND THE AIR FORCE
Headquarters, Louisiana National Guard
Office of the Adjutant General
Jackson Barracks
New Orleans, LA 70146-0030

15 July 1994

Beech Aerospace Inc.
Madison, MS

Recent events have caused me increased concern regarding the maintenance of the C-12 assigned to Louisiana.

Specific details of events occurring in the maintenance of BP32 (tail #80-23784) relating to electrical, avionics and air conditioning work, although troublesome, do not concern me as much as the relationships and attitudes which have developed in the workforce assigned to the New Orleans bed-down site.

Situations both witnessed by me and reported to me, have occurred at this location which seem to me to be quite atypical, somewhat negative and degenerative in nature. To be specific, the following key points appear to be true and are adversely affecting the quality of service available to maintain the Louisiana C-12.

a. For reasons unknown to me there seems to be a poor relationship between Ms. Kim Greenwell and Mr. James Stout. It is characterized by poor communication by both parties and a lack of teamwork to some extent. My opinion is that Mr. Stout probably has more ability and experience than Ms. Greenwell, but is not effectively utilized. This may be due to her lack of experience or to interpersonal difficulties.

b. The relationship issue is also a problem with CW3 Michael Boudreaux, Aircraft Systems Foreman for AASF #1, (alternate COR) and Ms. Greenwell. I have taken steps to replace CW3 Boudreaux with CPT Barry Keeling C-12 pilot (full time) as the alternate COR to relieve the tensions and provide a fresh start to what has proved to be a difficult beginning.

c. Poor communication, questionable teamwork and resulting lack of confidence have displaced the quality working environment which is essential to excellent service in quality organizations.

d. After some history of this behavior, I have now become concerned that the atmosphere conducive to professional, competent support has eroded to a degree which would permit ineffective maintenance actions to become commonplace and could possibly compromise safety.

4. In conclusion, I would like to request that an appropriate adjustment be made within the BASI workforce which would relieve the current situation. As the State Aviation Officer, I am committed to working through tough times for the mutual benefit of Beech Aerospace and the National Guard. I will cooperate fully with your recommendations and am willing and anxious to communicate directly with BASI personnel regarding the issues discussed herein.

FOR THE ADJUTANT GENERAL:

/s/ Philip W. Nuss
PHILIP W. NUSS
LTC, GS, LAARNG
State Army Aviation Officer

[DoD Logo]

DEPARTMENTS OF THE ARMY
AND THE AIR FORCE
Headquarters, Louisiana National Guard
Office of the Adjutant General
Jackson Barracks
New Orleans, LA 70146-0330

15 July 1994

To Whom This May Concern:

When Kim Greenwell first began working at this facility with the Louisiana Army National Guard, she was very demanding about things concerning the BASI office work area, a BASI parking spot, and equipment that we were to provide to her. Every time she needed something from us she always made sure she informed us that we had to do this because it was stated in the contract. Since BASI contract maintenance wall all new to this facility we were really not sure what the BASI contract stated that the facility had to provide to her and BASI.

Since Kim arrived at this facility she has had somewhat of a negaive attitude towards most of the people at this facility.

After working with Kim as the alternate COR for about six months, I was told by the other BASI maintenance technicial at this facility that she didn't want me in the BASI office, but as the alternate COR, I was the person responsible to maintain an accurate DA Form 1352 report for the C-12. So I had to go to her office to get flight times, and up and down maintenance times.

Kim Greenwell thinks that she doesn't have to operate by this facility's policies and procedures when it comes to good housekeeping and flight line operations. She thinks she can do whatever she wants and do it Kim's way.

I really feel if it were anybody else other than Kim Greenwell that this facility wouldn't have the problems we have with BASI. As far as the other BASI Maintenance Technician at this facility, we have no problems at all with this person. He always has a positive and professional attitude, and always request support from this facility rather than demand things be done. His overall performance far exceeds that of Kim Greenwell.

In closing I really feel that if Kim Greenwell was removed from this facility that the problems we have with BASI would be solved.

I've always been more than willing to help or assist BASI with anything I could, but for the most part Kim hardly ever accepted our help with anything. Within the past couple of weeks when the C-12's air conditioner was down for maintenance, I offered to make a line for her, but she insisted that she order the line from Beech.

If I can be of any assistance to BASI concerning Kim Greenwell, feel free to contact the undersigned at 504-243-7630 between 0630 and 1600 hours, Monday-Friday.

Sincerely,

/s/ Michael A. Boudreaux
MICHAEL A. BOUDREAUX
CW3, LAARNG
Allied Systems Foreman

DEPARTMENT OF THE ARMY
AND THE AIR FORCE
Headquarters, Louisiana National Guard
C-12 Detachment
Building 101, Lakefront Airport
New Orleans, LA 70126-1491

18 July 1994

BEECH AEROSPACE, INC.
MADISON, MS

Due to recent events we feel it has become necessary to inform BASI of our concerns as to the quality of maintenence being performed at base 551 in New Orleans, LA on BP32.

Starting with the most recent event we will discuss several problems that are causing concerns:

a. Our air conditioner has been inoperative for the past seven weeks. The initial part replaced was the hot bypass line, which did not repair the system. Next the evaporator coil was determined to be leaking Freon (it should be noted that the Freon detector was discovered defective and has not been replaced). When the evaporator coil arrived, the leadperson installed it alone because the assistant mechanic was on leave. The system appeared to be working after being charged; After completing the mission that day the aircraft did not fly for two days. On the next flight the air conditioner was inoperative. A rover mechanic was replacing Ms. Greenwell while she was at a school but did not have time to trouble shoot the system before the next flight. While flying out in Austin, TX the forward vent blower failed filling the cabin with smoke and fumes. The blower was replaced by BASI in Austin at which time we requested that the air conditioner be checked and repair if possible. At this time the quality of maintenance became apparent! The evaporator coil that had been replaced two days earlier had two fittings

with crossed threads. In addition a line that attaches to the evaporator was deformed at the attaching point, the expansion valve was cross threaded, all the fittings were covered in pro seal and the evaporator was not installed properly in its bracket which allowed it to vibrate and move around.

b. Fuel has been leaking through wing panels and running down the landing gear we were told this was a normal situation and the DA 2408-13's were signed off repeatedly. Finally a flame arrester was replaced, but we are still not convinced that this situation is corrected.

c. Ms. Greenwell did not completely defuel an auxiliary tank before replacing a gasket around the filler cap and excessive jet fuel spilled onto the hangar floor.

d. The leadperson was caught smoking in a non-smoking area by a recent ARMS inspection team, safety officer, and then was caught again after being counseled.

e. After a brake failure it was determined that a brake line needed to be replaced and Ms. Greenwell ordered a bleed air line instead of the hydraulic brake line. In addition she did not know how to get the tire rims apart to replace the brake line.

f. While on preflight both fuel boost pumps failed to operate after work was performed on the fuel gages, the leadperson was unable to determine the cause. To prevent a mission cancellation, a facility fixed wing mechanic was used to read the wiring diagram. He pointed out that it was the inertial switches located in the overhead panel that were tripped.

g. Ms. Greenwell as a leadperson needs to improve her attention to detail and attitude for mission requirements. Several examples of this are as follows:

1. She repeatedly refuels the aircraft within 15 minutes of departure time.

2. Leaves the chocks on the ramp after the aircraft's departure where helicopters hover.

3. Installs the carpets loose after inspections or maintenance creating hazards to crew and passengers.

4. Does not display fuel samples and acts put out if they are requested to be seen.

5. We have had a forward cowling improperly attached, come loose at 25000'.

6. In one case The Adjutant General showed up about 20 minutes early she made the statement "Its not my fault he showed up early" when the aircraft was not ready in his presence.

It is apparent that normal maintenance procedures are not being adhered to and quality control is lacking. In addition to the stated maintenance problems there is a poor work relationship between Ms. Greenwell and Mr. Stout. It is well known throughout the hanger that there has been and continues to be friction between these two individuals. This was evident in a recent comment made to the COR by the leadperson that while in her absence she preferred to have the rover do the paper work instead of the assistant mechanic. This relationship is disruptive and is not conductive to quality maintenance.

When this aircraft was assigned to the state we did not have a qualified BASI team to accept it, so it was accepted by a rover. The leadperson was attending C-12 school and the assistant mechanic had not been assigned at that time. We felt in time, Ms. Greenwell could possibly develop into a good C-12 mechanic. However, we also feel that the leadperson needs to work as an assistant to a highly qualified C-12 mechanic to achieve this. Her leadership abilities also need developing.

In light of the apparent substandard maintenance and poor working relationship with her assistant we have lost

confidence in Ms. Greenwell's mechanical and leadership abilities. We strongly feel that there is a need for change.

/s/ Norris P. Babin
NORRIS P. BABIN
CW4, AV, LAARNG
COR

/s/ Barry D. Keeling
BARRY D. KEELING
CPT, OV, LAARNG
ASST COR

[DoD Logo]

DEPARTMENT OF THE ARMY AND
THE AIR FORCE
Headquarters, Louisiana National Guard
Office of the Adjutant General
Jackson Barracks
New Orleans, LA 76146-0330

19 July 1994

To BASI

Since Ms. Kim Greenwell has arrived at this facility there has existed a definite schism between her and the personnel who work primarily in the hangar area. Her attitude caused dissension between the C-12 pilots and the technicians.

Her attitude has been one of telling, rather than requesting parts, tools or help. I personally can attest to the fact that all of my mechanics and supervisors have gone out of their way to attempt to appease her. This was for naught.

Some specific examples of her attitude towards this facility and total disregard for any type of authority can be seen in the only discrepancy this facility received during a January 1994, Aviation Resource Management Survey (ARMS). Her shop was written up as unsafe because she was smoking during the inspection. The inspector verified that she had received notification on at least two occasions through memorandum that smoking was only allowed in one area outside of the hangar. It was the inspector's impression that she knew the regulation but cvould care less about following the rules. When questioned on her use of NEK cleaning solvent, she took a defensive attitude instead of a helpful one. She threatened work stoppage and that this facility would have to pay for any other solvent that we make her use. This was only brought up because the facility safety officer received complaints from mechanics of headaches from the fumes.

She also refused on four occasions to remove tape placed on the hangar floor that BASI personnel had placed to park the C-12 in the same place. She was asked by the facility maintenance officer to remove the tape on four occasions and then claimed if she was made to do this then she would put in a claim to BASI to charge this facility. I told the C-12 COR to get the tape up and if we had to pay for it, do it. She then managed to get the tape up.

Ms Greenwell does not fit into the type attitude that all my employees show, that is, a helpful and generally happy one. She has shunned all help and any display of friendship or camaraderie that was shown towards her or her job. She is not the type of individual I enjoy having work at my facility. My recommendation is that she be reassigned to some other facility or where ever you feel she would fit in best.

Sincerely,

/s/ Thomas J. Mix
THOMAS J. MIX
MAJ, LAARNG
Facility Commander

WHAT IS SEXUAL HARASSMENT?

■ Courts just beginning to sort out what constitutes sexual harassment

By Erin Kelly
Gannett News Service

WASHINGTON—Seven years ago, Anita Hill and Clarence Thomas brought sexual harassment into America's living rooms and started a raging debate over how women are treated at work.

Now, as Paula Jones' harassment suit against President Clinton heads toward a possible spring trial, arguments are once again heating up at dinner tables and lunch rooms.

Among the causes of indigestion: Has a woman been harassed if her boss propositions her but doesn't try to hurt her when she rejects him? Should employers ban all office romances to protect themselves from lawsuits? If men tell dirty jokes in the work place, are they guilty of sexually harassing their female co-workers?

So far, the only thing Americans seem to be sure of is that they are confused.

Sexual harassment has become a part of most people's vocabulary, but they are often fuzzy about exactly what it is.

"The problem is that sexual harassment hasn't been clearly defined," said Ron Riggio, a work-place expert at Claremont McKenna College in California. "It isn't a black-and-white kind of situation. Nobody really knows definitively whether a certain incident is or isn't sexual harassment."

Employers have added to the confusion by issuing vague harassment policies designed more to protect themselves from lawsuits than to enlighten employees, said Nancy

Hauserman, a professor at the University of Iowa's College of Business.

"I have a nagging feeling that sexual harassment is not a priority for most businesses," she said. "And there are people who gain from that confusion. Some men will throw up their hands and say, 'We can't even tell a joke or give a compliment anymore,' even though that's not what the courts are saying. It somehow diminishes the whole concept of sexual harassment by keeping it unclear."

The type of sexual harassment most people understand best is what's known as quid pro quo: the classic case of a woman's boss demanding she have sex with him if she wants to keep her job, get a raise or win promotion.

But even such clear-cut cases have been causing legal controversy, and the Supreme Court now is stepping in to help sort it out.

Justices this year are hearing four cases, most notably whether Kimberly Ellerth, a former marketing representative for Burlington Industries, can be awarded monetary damages although her boss did not carry out alleged threats to hurt her career when she rejected his sexual advances.

Lower courts have split on the issue, with some ruling that you haven't really been harassed unless you've suffered financially.

President Clinton's attorneys are using a similar argument, saying that even if Paula Jones' allegations that he denies are true, she was not punished at work. In fact, they say, she received raises of 25 percent over two years in her job as a clerk in Arkansas government.

Jones' attorneys argue that sexual harassment violates a woman's civil rights' protections against discrimination —even if there is not retribution.

The latest sexual accusations against the president—of an affair with former White House intern Monica Lewinsky—would not qualify as harassment under federal law because it was a consensual relationship. But some feminists, including a Northern Virginia chapter of the National Organization of Women, have argued that a sexual relationship between a boss and an employee is an abuse of power and therefore a form of harassment.

Most would disagree, Riggio said.

"For a sexual advance to be harassment, it has to be unwelcome," he said. "But I do think people who are in positions of power need to be very careful about their relationships. You can't deny your position or your power, and the effect it can have on your employees."

As a result, many companies have policies against it.

The Paula Jones case

Even if Paula Jones' sexual harassment allegations against President Clinton are true, Clinton's attorneys say it would not constitute harassment because she was not punished in any way and, in fact, later received 25 percent pay raises.

Jones' attorneys argue sexual harassment violates a woman's civil rights, even if there is no retribution.

The law is even murkier when sexual harassment by a woman's co-workers creates a "hostile work environment" that prevents her from doing her job.

There have been numerous cases in which female employees have charged that male co-workers targeted them

for sexual harassment, often as a way to make it clear that women are not welcome in traditionally male jobs.

Case in point: A jury in the fall awarded damages to Tammy Blakey, the first female captain of Continental Airlines' A300 Airbus, who complained that pornographic photographs repeatedly strewn by male employees throughout the cockpits of the planes she piloted created a hostile environment.

But serious cases have been overshadowed recently by highly publicized incidents of schools and businesses adopting policies many folks may think absurd.

Just this year, in Fullerton, Calif., a junior high principal temporarily banded hugging between students because public displays of affection could create a "hostile environment" that might make some people uncomfortable.

Then there was the summer's notorious *Seinfeld* case, in which a jury awarded $26 million to a man fired by Miller Brewing Co. for telling a female co-worker about a sitcom episode that revolved around a woman whose name rhymed with a female body part.

The verdict was seen by some court observers as a backlash against the increasing number of harassment complaints, which have more than doubled in the last seven years—from 6,127 in 1991 to 15,889 in 1997, according to the Equal Employment Opportunity Commission.

Feminist law professor Vicki Schultz of Yale University fears the backlash will grow if courts and corporations continue to elevate sexual interactions above broader forms of gender discrimination in the work place.

"The focus on sexuality has led some companies to engage in what I call over-reaching," Schultz said. "If

someone just talks about sex, that's seen as a problem. I don't want to see men or women fired in the name of sexual harassment law because they tell a sexually explicit joke in the work place, I think it gives feminism a bad name."

In a *Yale Law Journal* article to be published in April, Schulz advocates a return to the original intent of Title VII of the Civil Rights Act of 1964, which prohibits discrimination against employees because of their sex in hiring, firing, wages, benefits or working conditions.

Sexually explicit harassment is just one form of discrimination in the work place, but courts have repeatedly ruled it is the only one that women can cite to sue their employers for creating a hostile environment, Schultz said.

As a result, she said, women who have been subjected to horrendous harassment at work have lost court cases because the abuse was not sexual.

Schultz cites a case in which Margaret Reynolds, a journeyman electrician, charged that she had been subjected to a constant barrage of harassment by male coworkers after being named sub-foreman of a construction job at Atlantic City's convention center. She said her male subordinates refused to work for her, directed obscene gestures and verbal abuse at her, and stood around laughing while she unloaded heavy boxes.

Reynolds and another female electrician were replaced by male workers when an exhibitor at the convention center demanded that female workers be removed from the floor during the Miss American pageant. Apparently, the exhibitor didn't like the contrast between female electricians and beauty contestants.

When the pageant was over, the convention center's director fired the whole crew and hired nearly everyone back the next day, with the exception of Reynolds and a few others. A man became the new sub-foreman.

When Reynolds sued, a federal court rejected her claim, saying she was not subjected to a hostile work environment because the harassment was not sexual.

"Women have had great success in making the case in court that unwelcome sexual advances are a form of discrimination," Schultz said. "But what the courts don't get is that there are equally harmful forms of abuse that are not sexual but are based on the fact that the employee is a woman."

While Schultz is hopeful the courts may redirect their focus, many companies continue to fret more about the sex lives of their employees than about whether men and women are given equal opportunities to succeed.

Even before news of the alleged Clinton-Lewinsky relationship broke, attorneys at Littler Mendelson of San Francisco were being asked by clients to draw up agreements shielding employers from lawsuits when office romances turn sour.

Employees who date one another are asked to sign statements saying the relationships are consensual and that they are aware of the company's sexual harassment policies, said Scott Wenner, a partner in the law firm.

The Clinton-Lewinsky flap will only increase the demand for these "relationship agreements," Wenner predicted.

Meanwhile, working women continue to face more basic problems.

"My (female) students tell me they are not getting the same types of entry-level jobs as men because employers believe they're just going to get married and have kids," said Martha Ackmann, professor of women's studies at Mt. Holyoke College in Massachusetts. "You'd think we'd be long past that now. But we're not."

SPECIAL REPORT

LAWS THAT RUN AMUCK

Two ill-conceived laws are to blame for the current crisis in American politics

By JEFFREY ROSEN WASHINGTON

AS AMERICA STRUGGLES TO UNDERstand the Lewinsky affair, there's a natural temptation to make sense of the drama by reducing it to a clash between individual heroes and villains. And so we have a parade of soap-opera caricatures—the overzealous and partisan prosecutor, the lusty young temptress, the bloodless wife, the philandering husband—all competing for blame in the public eye.

But the real villains in the current crisis are bad laws, rather than bad women or bad men. In particular, the explosive collision of sexual-harassment doctrine and the Independent Counsel Act, combined with the erosion of legal protections for privacy, has led to violent breaches of the boundaries between public and private life. At each stage in the endless legal battles, judges, prosecuotrs and lawyers have made decisions that, while technically defensible, have had brutal consequences for the parties, their innocent friends and, ultimately, the country.

Let's begin with sexual harassment. Last May, when the Supreme Court rejected President Clinton's claim that Paula Jones' sexual-harassment suit should be delayed until he left office, the Justices unanimously dismissed the President's claim that allowing the suit to proceed would generate unrelated litigation that might hamper his ability to do his job. The events of last week suggest that the court's optimism was misplaced.

Much of the problem stems from the elastic nature of sexual harassment itself, which is defined so expansively (it includes "unwanted advances" that create an "offensive working environment") that no one is quite sure what it

means. After the court ordered the Jones case to proceed, President Clinton's lawyers made a plausible argument that her suit should be dismissed without a trial. Even assuming, for the sake of argument, that her allegations were true, the President's lawyers said they didn't add up to illegal harassment.

To win her case before a jury, Jones would have to prove that Clinton had conspired, in his official capacity as Governor, to deprive Jones of her constitutional rights. But it's hard to see how making a pass at someone and taking no for an answer violates the Constitution. (Jones' claims that Clinton retaliated against her for resisting his advances are far less convincing.) Nevertheless, the law required Judge Susan Webber Wright to give Jones every benefit of the doubt at the beginning of a case, and so she allowed Jones' lawyers to begin "discovery."

That's where the trouble started. Sexual-harassment suits have a tendency to spiral out of control because the relaxed rules of civil discovery permit lawyers for the plaintiff to rummage freely through the defendant's sexual history, to try to prove a pattern of "unwanted advances." In criminal trials involving serious sexual allegations, such as rape, inquiries into the sexual history of the alleged victim and the defendant are more carefully limited.

What followed was a gross invasion of privacy. During a three-year search, Jones' lawyers sent private investigators to comb the country, using the rough force of subpoena power to compel women who were rumored to have had consensual affairs with the President to discuss their sex lives against their will. At least five women denied the rumors in pretrial depositions, one of whom was Monica Lewinsky. But merely by asking these intrusive questions, Jones' lawyers were able to force Lewinsky, as well as the President, to discuss their private lives under oath.

Enter Kenneth Starr. The independent counsel had been given tapes of Lewinsky that suggested that she and

the President might not have told the whole truth about their relationship. In an ordinary civil suit, evidence that a witness lied in a deposition might, at worst, be used to embarrass her at trial, and ultimately the jury would decide whom to believe.

But *Jones v. Clinton* wasn't an ordinary civil suit because it was being shadowed by the independent counsel. Confronted with the secret tapes, Starr was technically within his authority to ask Attorney General Janet Reno to recommend an expansion of his jurisdiction. Like sexual-harassment litigation, the Independent Counsel Act is so elastic that it authorizes the investigation of "other allegations . . . arising out of" the original Whitewater assignment. And if Clinton had asked his friend Vernon Jordan to get Lewinsky a job at Revlon to buy her silence in the Jones inquiry, Starr could plausibly wonder whether this made it more likely that Clinton had also asked Jordan to get a job at Revlon for Webster Hubbell, the former Associate Attorney General, to buy his silence in the Whitewater inquiry.

Although plausible, the theory was so elaborate that Starr's efforts to prove it soon began to unravel. On Jan. 29, Judge Wright in Arkansas ruled that "evidence concerning Monica Lewinsky should be excluded" from the Jones trial, on the grounds that it was more likely to confuse a jury that cast any light on Jones' claims. Better late than never.

As a result of Judge Wright's ruling, Starr's efforts to make a case that Clinton committed perjury have become much more complicated. Most prosecutors would hesitate to bring perjury charges when the alleged lies aren't material to the case—in other words, when there's little chance they would influence the outcome of the case. Even Starr's friends acknowledge that Judge Wright's ruling makes it far less likely that Starr will ever bring perjury charges against Clinton or Lewinsky, which also reduces his leverage in securing Lewinsky's cooperation.

Where does that leave the independent counsel? He still plans to investigate whether the President obstructed justice by encouraging Lewinsky to lie in her deposition. But without Lewinsky's help, Starr isn't much closer to proving that charge than he was before the ugly drama began. Even if Starr does uncover evidence that Clinton encouraged Lewinsky to lie, he's unlikely to prosecute because most legal scholars believe the President can't be indicted before he is impeached. Because of the odd incentives created by the Independent Counsel Act, which allows Starr to justify his existence by pinning a crime, any crime, on his target, the investigation will continue to lurch from one allegation to the next, with its ending always just out of reach.

If anything good comes out of this dark episode in American politics, it will be a reexamination of the ill-conceived laws that made it possible. Perhaps Democrats and Republicans, in an act of mutual disarmament, will finally let the law expire when it comes up for a reauthorization vote next year. And perhaps the Supreme Court will seize the opportunity presented in several cases this year to refine the definition of harassment in ways that recall its core meaning of sex discrimination in the workplace. Finally, Congress could acknowledge that the Supreme Court was too optimistic in the *Clinton v. Jones* case, and give future Presidents temporary immunity from civil-law suits while in office.

Ultimately, of course, the President must take responsibility for his own behavior. But as long as these illiberal laws remain in force, we will continue to suffer from the criminalization of sex and the criminalization of politics, regardless of who lives in the White House. ■

Time, March 23, 1998

CLINTON'S CRISIS

SEXUAL HARASSMENT CAN MEAN FIRING VICTIMS WHO DON'T GIVE IN OR MERELY TELLING A DIRTY JOKE. CLINTON'S FATE RESTS ON LAWS THAT TIE EVEN LAWYERS INTO KNOTS

SEX AND THE LAW

By JOHN CLOUD

Bill Clinton should be happy that Paul Jones' sexual-harassment lawsuit against him won't be decided by the city attorney of little Murfreesboro, Tenn. It was there in 1995 that local artist Maxine Henderson exhibited some of her work in the city hall rotunda, including *Gwen*, a painting of a partly nude woman. A city employee saw the painting and was offended—so much so that she filed a sexual-harassment complaint against her employer. City attorney Tom Reed promptly whisked the painting away. Although a judge eventually ruled that Henderson had a First Amendment right to hang her art in the rotunda (it's a public place, after all), the lawsuit frightened Reed. To this day, he won't allow *Gwen* to be displayed in city offices that aren't public places. "In my opinion, that would count as sexual harassment," he says.

In today's overheated legal environment, if an impressionistic painting more modest than many at Matisse can, on its own, count as sexual harassment, the President could be doomed. Jones maintains that as Governor of Arkansas, Clinton exposed himself to her and asked for oral sex at a Little Rock hotel. There was nothing impressionistic about it, Jones said in her deposition last fall: "I mean, it was disgusting."

Her account is a matter of great dispute, one likely to land the President's case in an Arkansas courtroom in

May. But in truth the tangle of laws currently defining sexual harassment is so jumbled that even if everyone could agree on the facts, it's simply impossible to predict the outcome of a case like *Jones v. Clinton*. Just 25 years ago, sexual harassment was considered a radical-fringe by-product of feminist theory. Today it's embedded in multiple Supreme Court decisions (three more are expected before July), thousands of corporate policies and a host of lower-court cases that have spread like kudzu across the legal landscape. The result is a thicket of rulings. Since 1991, juries have returned well over 500 verdicts on sexual harassment—decisions that often contradict one another and send mixed signals about how we should behave anytime we meet a co-worker we'd like to see after five.

Because of the twin trends of long hours (10% more than we worked in 1969) and more women working (18 million more today than in 1980, or about 50% of the labor force), more Americans than ever are flirting, dating and propositioning at work. Actually, only a tiny proportion of office come-ons result in harassment complaints; of those that do, just 9% end up in formal proceedings, whereas 38% of relationships that start on the job survive into the long term. The huge surge in sexual-harassment cases that took place in the early '90s has slowed. Such cases are still being filed at the rate of 15,500 a year—some 60 new cases every working day—compared with 6,900 in 1991, but the number hasn't changed much for three years. A recent survey of human-resources managers found that 7 out of 10 handled at least one sexual-harassment complaint last year, down from 9 out of 10 in 1995.

Meantime, employers fearing lawsuits are stopping harassment before it starts. Some, like General Motors and Wal-Mart, have instituted zero-tolerance policies banning just about any speech or conduct with sexual undertones, like sending E-mail with a naughty Web address to a

co-worker, which not so long ago would have been deemed not just harmless but constitutionally protected. While it's rare for nonthreatening behavior to be ruled harassment, it happens. In 1993 the University of Nebraska forced a grad student to remove from his desk a picture of his bikini-clad wife after two fellow students complained that the photo violated the school's sexual-harassment policy.

The legal principle of harassment hinges on impossibly squishy terms like "unwelcome" and "pervasive," words that a thousand lawyers can define in a thousand ways. As a consequence, some despicable harassers get off easy, just as some men (and, increasingly, women) with innocent intentions can have their lives ruined. That's because intent seldom defines harassment; reception and perception do.

The confusion and excessive rulemaking may already be sowing the seeds of backlash. In a recent TIME/CNN poll, just 26% of those surveyed called sexual harassment of women "a big problem," down from 37% in 1991. What's more, 57% of men—and 52% of women—agree that "we have gone too far in making common interactions between employees into cases of sexual harassment."

In short, many think the solution has become as bad as the problem. "In 1964 [when discrimination based on gender first became legal]," says UCLA harassment-law expert Eugene Volokh, "if you told a member of Congress, 'If you vote to bar discrimination based on sex, you will prohibit employees from putting pictures of their wives in bikinis on their desks,' most legislators would have said, 'Wait a minute, where does it say that?' "

What exactly is the law on sexual harassment, and how did it evolve into such a beast? Legally speaking, there are two kinds of sexual harassment, and Jones—to take a not so random example—charges both. The first is called "quid pro quo" harassment, and it's the easier to grasp. If your boss docks your pay or fires you or otherwise pun-

ishes you for rebuffing an advance, he's flat-out guilty. Jones, for instance, says her supervisors at the little state office where she was a clerk mistreated her after she rejected Governor Clinton's alleged advance. Her co-workers got bigger raises, she says, and her job became a "dead end." Clinton has denied that he propositioned her (and indeed has deneid that he ever sexually harassed any woman). Further, Clinton's lawyers say there was never any "quid" for Jones' refusal to "quo"—that she received a promotion and pay hikes as the others did.

A generation ago, Jones would have had no case. Not even blatant quid pro quo harassment was illegal; many judges simply deemed such matters "personal." When they were allowed to bring lawsuits, plaintiffs—nearly all women today—had no right to jury trials, leaving their fate up to a mostly male stable of judges.

Things began to change, albeit slowly, in the '60s. In 1964 Southern members of Congress tacked "sex" onto the list of protections in the pending Civil Rights Act, not because they cared about harassment but because they thought the idea so laughable that it would kill the entire bill. It wasn't until the 1970s that courts started taking the antidiscrimination provisions on sex seriously, and not until 1977 that a federal court of any stature—the U.S. Court of Appeals for the District of Columbia—said quid pro quo harassment violated the act. After the 1991 furor between Anita Hill and Clarence Thomas raised public consciousness, George Bush signed a law granting sexual-harassment plaintiffs the right to jury trials and big-mony damages.

Even then, quid pro quo cases remained tough to prove, since employers could simply say the retribution resulted from poor job performance. Victims began to point out that co-workers could create an abusive climate against women without actually demanding sex in exchange for something. One such victim was Mechelle Vinson. In the 1970s Vinson worked as a teller at Meritor Savings Bank,

where, she later claimed, her boss began asking her for dates. At first she said no, but eventually she relented; she estimated they had sex 40 or 50 times. She claimed that she felt pressured into the relationship and that he exposed himself, groped her at work and even raped her several times. Still, he never fired or even demoted her when she objected. Vinson lost her court case.

With the support of several women's groups, however, she appealed. In 1986 the Supreme Court ruled in her favor—and in doing so threw open a huge new arena for sexual-harassment claims. In its first ruling ever on sexual harassment, the court held that speech or conduct in itself can create a "hostile environment"—like the one Vinson alleged at Meritor—and that such an environment violates the Civil Rights Act. According to the Justices, unwelcome verbal or physical behavior, if "severe or pervasive" enough, is discriminatory even when there is no quid pro quo.

Today quid pro quo cases remain hard to win, and most sexual-harassment cases are based on the looser principle of "hostile environment." At a trial last year, Staci Bonner, a former research editor suing *Spin* magazine and its publisher Bob Guccione Jr., failed to convince a jury that because Guccione gave choice assignments and other perks to women who slept with him—but not to her—he was guilty of quid pro quo harassment. But the jury did say that his apparent favoritism, as well as other editors' coarse propositions and unwanted back rubs, created a hostile environment at the music magazine. The case is being appealed.

Given the expansive terminology, just about anything can count as a hostile environment, depending on who's defining the terms. In 1995 the Montana Human Rights Commission awarded damages to Josephine Dernovich, a former municipal clerk horrified by smutty pictures her co-workers passed around. The images were stomach churning to her—some depicted bestiality and incest—but

no one else complained. None of the pictures was directed solely at her, and most of her colleagues were women. It's hard to understand how she was discriminated against because of her sex (and not, say, her attitudes about sexual pictures). Still, Dernovich won.

Paula Jones too is asserting that Clinton's alleged pass at her created a hostile environment, but she may have a hard time proving it. The judge in the case has ruled that a single incident of harassment could be enough to create a hostile environment. But most experts agree that such an incident would have to be especially outrageous. "From what I've seen, [Jones] clearly doesn't have pervasiveness—it was just one incident—so she has to prove severity," says Deborah Epstein, who teaches law at Georgetown University. "And there are lots of things worse than this incident that the courts have said are not severe enough." Epstein cites the plight of Kimberly Weinsheimer. In the mid-80s Weinsheimer was a Rockwell International Corp. employee who inspected parts used to build spacecraft at the Kennedy Space Center. In her suit, Weinsheimer said that over an eight-month period, a co-worker frequently asked that she "suck him," grabbed her crotch and breasts and once held a knife to her throat. Another colleague allegedly touched his penis to her hand when she was looking away. Even so, a federal court ruled against her, in part because the judge thought the harassment wasn't severe enough. "The comments, in both their nature and their causes, were apparently commonplace and routine," the judge wrote, as if frequently somehow diminished severity.

To avoid the same fate, Jones' lawyers now argue that Clinton was more aggressive in the hotel room than Jones said in her original 1994 complaint. In her recent deposition, Jones said that Clinton in fact tried to grab her crotch and kiss her and that he briefly blocked her way—not simply that he had lightly touched her, as Jones first said. These elements make the incident sound much more "severe," especially coming from her ultimate boss.

(Courts are tougher on accused CEOs than accused co-workers.) Clinton's attorneys, who contend that the new details are lawyer-induced embellishments, will doubtless want jurors to compare Jones' original complaint with her current story. Just one Friday she added several charges, including an expert's testimony that the alleged incident left her with symptoms that resemble post-traumatic stress disorder.

Jones' team is employing a legal strategy that most sexual-harassment plaintiffs can't afford—a search through the garbage bin of Clinton's sexual history. Specifically, her lawyers hope to present "a pattern and practice" by the President of sexually harassing other women, bolstering Jones' broader claim of sexual discrimination. (The courts have said such patterns are relevant in discrimination cases.) Jones and her lawyers figured that if they could find as yet undetonated "bimbo eruptions" in Clinton's past, they could show this damning pattern: that again and again Clinton hits on women with less power than he. It was this investigation that yielded Monica Lewinsky, not to mention Kathleen Willey and dozens of others tracked down by the Jones team. Today Willey could be Jones' best shot at showing the pattern. When she was a White House volunteer, Willey says she went to the Oval Office to ask the President for a paying job. Before she left, she says, Clinton hugged her, felt her breasts and then placed her hand on his aroused genitals. In his own deposition, Clinton denied each of these charges.

Clinton's lawyers in turn scoured Jones' sexual past, but whatever they came up with probably won't be presented in court—thanks in part to Clinton. In 1994, when he signed the Violence Against Women Act, he restricted the kinds of digging that defendants can do into the past of sexual-harassment plaintiffs—and specifically allowed such evidence against harassers who are accused of assault (the Jones team has argued in pleadings that Clinton's alleged behavior in the hotel room amounts to

assault). "Now you have to be very careful about dredging up a woman's psychological or sexual history," says Judith Vladeck, a New York City lawyer who has handled sexual-harassment cases for 20 years. Technically, the new rules don't apply to the Jones case, as she filed suit before they took effect. But the rules have created a new climate in which such evidence appears unseemly. And anyway, for political reasons a Democratic President won't want to look too aggressive in trashing his accuser.

The Jones team's search has doubtless been frustrating even as it has embarassed the White House: Lewinsky, the biggest catch, won't be part of the trial. Federal Judge Susan Webber Wright has ruled that no one can drag that scandal into her courtroom, in part to avoid interfering with special prosecutor Kenneth Starr's case. And anyway, no one claims that Clinton's alleged encounters with Lewinsky were unwelcome. Still, says Washington lawyer Douglas Huron, "if a man uses the power of his position to pursue a woman, then that could be deemed relevant." In spite of Wright's ruling, it's easy to imagine that "consent" is meaningless when offered by a starstruck intern. If Clinton were president of a FORTUNE 500 company instead of the country, he'd probably be toast. "If a CEO had sex with a 21-year-old girl in his office," says Monica Ballard, a consultant who advises businesses on sexual harassment, "I would tell the company, 'Fire him for poor judgment.'"

Employers pay people like Ballard hundreds of dollars a day for their advice. Headlines on sexual harassment scare the money out of them. Just last month the EEOC obtained its largest sexual-harassment settlement ever when drugmaker Astra U.S.A. agreed to pay nearly $10 million to scores of employees who claimed they had been fondled, asked for sex or exposed to a hostile environment by the former company president and others. Other firms have lost even more in jury verdicts favoring plaintiffs.

Companies have responded to the legal morass with wildly varying policies. Some ignore the issue, and others,

particularly those burned with lawsuits, even ban inter-office dating. Nearly 9 out of 10 companies have procedures for dealing with sexual harassment, according to a recent survey, but many of those procedures are weak—"a paragraph in the company handbook," says Ellen Bravo, co-director of the National Association of Working Women.

Experts routinely warn companies not to get caught with lax policies, which can enrage juries and inflate settlement costs. Consultants' on-site training is usually straightforward; if what you're thinking even vaguely involves sex, keep it to yourself. Ballard poses hypotheticals such as, What if someone gets the Victoria's Secret catalog at work? "If someone makes a comment about that, you get rid of it," she says. Parallax, her company based in Santa Monica, Calif., teaches that one complaint is enough to change office policy—and such advice is becoming the standard in business schools and financial newspapers. A U.S. Department of Labor brochure on sexual harassment even advises that those who hear "sexual jokes or . . . sexual things that you didn't like" could be victims. Several states offer equally broad, subjective definitions.

Employers are heeding the advice, sometimes too well. The University of New Hampshire suspended a professor of technical writing, J. Donald Silva, in 1993 for classroom remarks he had made the previous year. Besides other suggestive comments, Silva had compared the focus required for writing to that demanded by sex. He had also said, "Belly dancing is like Jell-O on a plate with a vibrator under the plate." Weird, yes. But harassment? The university thought so and directed Silva to take counseling at his own expense. Instead he filed suit. Backed by the Center for Individual Rights, a conservative Washington-based advocacy group, Silva won. A federal judge ruled that the school had trampled n his First Amendment rights. The university reinstated Silva, who is now 62 and teaching once again.

Some employers have got more than a slap on the hand. In an important case in California, a jury awarded Ralph Cotran $1.78 million in lost compensation four years ago in a wrongful-termination lawsuit against his former employer, insurance brokerage Rollins Hudig Hall International. The company fired Cotran in 1993 after two secretaries alleged sexual harassment. He denied it and claimed that he and two women had been involved in consensual relationships. "I didn't do it, but the company ignored every shred of evidence on my side," he says today.

The jury agreed with the defendant—as have other juries in a few such backlash cases. The most famous was brought by Jerold Mackenzie, a former Miller Brewing executive, who claimed that the company wrongfully interfered with his employment status after a co-worker, Patricia Best, accused him of sexual harassment. He had recounted for Best an episode of *Seinfeld* on TV that indirectly referred to the clitoris, and then showed her the word in the dictionary. A jury gave him $26.6 million last summer.

But such cases remain the exception, and few have been upheld on appeal. Part of Mackenzie's giant damage award has already been set aside by a judge. And the California Supreme Court dealt Cotran a setback in January, when it ordered a new trial, which may be harder for him to win. The court said if employers fully investigate and arrive at a "good-faith belief" that harassment occurred, they may fire the alleged harasser.

The next big legal battle on sexual harassment will probably center on free-speech concerns. UCLA's Volokh says liberal court rulings have had a "chilling effect" on free speech at work. He says many employers are scared to write anything other than zero-tolerance policies that prohibit any potentially offensive speech. "Something like 'Women don't belong here,' that's sexist, but it should be protected speech," Volokh says. Few defendants have used the First Amendment as a defense. ("Lawyers just

don't think about it," Volokh adds.) As sexual-harassment laws strike further and further into what we are allowed to say to our co-workers, look for that to change.

Of course, some contend that giving up our right to tell dirty jokes is a small price to pay to prevent harassment. Georgetown's Epstein argues, "I think that one has to balance your concern for the First Amendment with your concern for equality." Maybe. But because so many of us spend more time at work than at home, today's co-workers are the neighbors and bowling-league partners of yesteryear. It's difficult to imagine that we can't talk to them about sexual topics—not just our personal lives but Monica and Bill, the teacher and her 13-year-old student lover, or Marv Albert and his dating habits.

Before this term, the High Court had issued just two major decisions on workplace sexual harassment. This term it has four cases, one of which it decided this month: it broadened sexual harassment to include same-sex cases. The three other rulings, expected before July, won't address the First Amendment, but they should end some other disputes over the law. In two of the cases—both scheduled for oral argument this week—the court will determine to what extent employers are liable for harassment to which top management has not been explicitly alerted. In the absence of such a ruling, many companies have assumed they are liable for just about anything and adopted zero-tolerance policies for everyone from the janitor to the CEO.

In one of the two cases, the court will decide whether to hold a Texas school district responsible for the actions of teacher Frank Waldrop. According to court documents, a cop discovered Waldrop having sex with an eighth-grader, who later claimed that the couple had had sex regularly. Her mother sued the school system, even though no school-district employees (except Waldrop, of course) knew about the affair. She argued that the district was

liable anyway, on the theory that employers are responsible for an employee's bad acts if his employment status helped the employee commit them.

The other case, *Faragher v. City of Boca Raton,* involves two municipal lifeguards in the town north of Miami who claimed that they were sexually harassed by their supervisors. A judge found that they had been harassed but that the city should not be held responsible because no officials in city hall knew about the abuse.

The third case before the court, arguably the most important of this term, was brought by a marketing employee at Burlington Industries. Kimberly Ellerth says her boss's boss made constant sexual remarks to her. He allegedly rubbed her knee and told her that her legs were nice but her breasts were too little. She says he once told her, "You know, Kim, I could make your job very hard or very easy at Burlington." Ellerth interpreted this to mean that she would have to have sex with the executive, a vice president, in order to get ahead. But in fact she never slept with him—and she did get promoted. A lower court ruled that Ellerth suffered quid pro quo harassment anyway—without actual retribution. Jones' lawyers have cited this ruling prominently. Burlington appealed, and now the Justices must determine if quid pro quo harassment can include mere threats.

Even after the court rules on these matters, there's likely to be confusion about sexual harassment. The end of the old patriarchal system, in which male bosses behaved as they pleased with female subordinates, has necessarily complicated gender relations in American offices. To sort out who is misbehaving now, the law must rely on subjective notions of power and courtship, sex and sensitivity. The best company policy would allow coworkers their freedom and privacy but punish truly unwanted, harmful behavior. But no one has figured out exactly what that policy should be—least of all the law-

yers and judges who keep adding new loops and threads to the complex web of sexual-harassment law.—*With reporting by Jay Branegan and J.F.O.McAllister/Washington, Dan Cray and Margot Hornblower/Los Angeles, Pat Dawson/Billings, Rod Paul/Portsmouth and Elaine Rivera/Southampton*